Crl.A. 81/2006
BEFORE
HON'BLE MR JUSTICE I. A. ANSARI
JUDGMENT & ORDER (oral)

1. This is an appeal against the judgment and order, dated 12.03.2004, passed, in Sessions Case No.232(N)/2003, by the learned Additional (Ad hoc) Sessions Judge, Hojai, Sankardev Nagar, convicting the accused-appellant under Section 376(2)(f) IPC and sentencing him to suffer rigorous imprisonment for ten years and pay a fine of Rs.1000/- and, in default, rigorous imprisonment for a further period of three months.

2. The prosecution's case may, in brief, be described as under : (i) On 06.01.2002, at about 6.00 P.M., the accused-appellant took F (whose name is not being revealed) aged about 5 years, to his house by saying that he would be going to the shop and F should give company to his wife. After, however, proceeding to some distance ,the accused-appellant forcibly put F on the ground and had sexual intercourse with her. F cried out in pain and the accused-appellant brought F on his lap to her house and left.

(ii) The mother of F, having learnt from F about what had been done to her by the appellant, appeared at Doboka Police Station, on 09.01.2002, at about 8.30 A.M., and informed the police that at about 6.00 A.M. on 06.01.2002 her co-villager, namely, Md. Harish Ali (i.e. the accused-appellant), had seduced her five years old daughter, F, took her to the jungle at the back of their house and committed rape on her and, on hearing hue and cry raised by the girl, when she came running, Harish Ali fled away. Based on this oral information, Doboka P.S. General Diary Entry No.176, dated 09.01.2002, was made. On the following day, i.e. on 10.01.2002, by making another General Diary Entry, namely, Doboka P.S. GDE No.181, dated 10.01.2002, a constable was deputed by the Officer-in-Charge, Doboka Police Station, to take F to the hospital, whereupon the girl (F) was taken to the hospital, where she was examined at about 2.00 P.M. on 10.1.2002 and it was found that she had multiple abrasions on her face and on both sides of 'labia' majora and labia minora have old infected laceration with discharge of pus. The doctor, on the basis of the findings so reached, opined that there were old infected laceration over the genitals of the girl, whose age was about 4-5 years.

(iii) After the medical examination, however, no further action was taken by the police, though the information, which had given rise to GDE No.176, dated 9.01.2002, aforementioned, having disclosed commission of a cognizable offence, was nothing, but a first information report and as the medical examination of the alleged victim by the doctor had already taken place, it was evident that the investigation to determine the veracity of the information, which had been given to the police by F's mother, had commenced.

(iv) Be that as it may, after a long lapse of time, F's mother lodged, on 06.08.2003, a written information with the police with regard to the occurrence, and treating this written information as the first information report, Doboka P.S. Case No.89/2003, under Section 376 IPC, was registered against the accused-appellant. Thereafter, statement of witnesses were recorded and, on completion of investigation, charge-sheet was submitted against the accused-appellant under Section 376 IPC.

3. However, the learned Sessions Judge, on perusal of the materials on record, framed a charge under Section 376(2)(f) IPC against the accused-appellant. To the charge so framed, the accused-appellant pleaded not guilty. In support of their case, prosecution examined altogether 8(eight) witnesses. The accused-appellant was, then, examined under Section 313 Cr.P.C. and, in his examination aforementioned, the accused-appellant denied that he had committed the offence alleg

ed to have been committed by him, his case being that of total denial. No eviden ce was, however, adduced by the defence. On the conclusion of the trial, the lea rned trail Court held the appellant, as already indicated above, guilty of the o ffence under Section 376(2)(f) IPC, convicted him accordingly and passed the sen tence as mentioned above. Aggrieved by his conviction and the sentence passed ag ainst him, the accused-appellant has preferred this appeal.

4. I have heard Mr. I. Hussain, learned Amicus Curiae, and Mr. B. S. Sinha, learned Additional Public Prosecutor, Assam, appearing on behalf of the respond ent. u

5. While considering the present appeal, it needs to be noted that the lear ned trial Court put some questions to F in order to determine if she had attaine d maturity to give her evidence and having satisfied that she is a competent wit ness, she was examined as PW 2. According to her evidence, she used to address t he accused as Mama (i.e. maternal uncle) and on the date of occurrence, in the evening, the accused-appellant asked her to go to his house to give company to his wife as he was going to the shop. However, the accused, according to PW 2, d id not go to his shop; rather, on the way, laid her on the ground under a tamari nd tree and inserted his penis into her vagina. She felt pain and bleeding start ed. As she raised hue and cry the accused-appellant took her on his lap and left her at her house, whereupon she told the incident to her mother. The villagers came and took her to the police station and that the police took her to the doct or.

6. In her cross-examination, PW 2 clarified that her mother (PW 1) had seen the accused-appellant leaving her (PW 2) at her house and also leaving the hous e.

7. Though PW 2 was subjected to long cross-examination, nothing was really elicited from her cross-examination except the fact that she had not stated to t he Magistrate (when her statement was recorded under Section 164 Cr.P.C.), that the accused-appellant had inserted his penis into her vagina. While considering this aspect of the evidence of PW 2, it needs to be noted that the Magistrate ha s made an observation while recording the statement of PW 2 under Section 164 Cr .P.C., that she is too young to make any statement. In such circumstances, the e xamination of the alleged victim (PW 2) by the Magistrate was meaningless. Unles s and until a person is found to be a competent witness, there is no purpose in his or her statement being recorded under Section 164 Cr.P.C. In the case at han d, the Magistrate having already noticed and recorded that PW 2 had not attained the maturity to make statement, ought to have declined to record her statement under Section 164 Cr.P.C. Undue importance cannot, therefore, be given to PW 2’ s statement recorded by the Magistrate and to her omission, in making the statem ent before the Magistrate, that the accused had inserted his penis into her vagi na.

8. Coupled with the above, what this Court notices is that closely corrobor ating the evidence of PW 2, the evidence of her mother (PW 1) is that the accuse d-appellant’s house is situated near her house and one day, at about 6.00 P.M., the accused-appellant took her daughter (i.e. PW 2) to his house to give company to his wife, because he was going to the shop and one-and half- hours thereafte r, he brought her daughter on his lap and, immediately, after keeping her (PW 2) at her house the accused-appellant left. It is also in the evidence of PW 1 tha t at that time, PW 2 was crying and when she (PW 1) asked her daughter (PW 2) as to what had happened, PW 2 responded by saying that while taking her, the accus ed-appellant had, on the way, laid her on the ground, removed her pant and inser ted his penis into her vagina forcibly. PW 1 has deposed that there was bleeding from PW 2’s vagina and she (PW 1) washed her (PW 2) off. PW 1 has also deposed that on the following day, she (PW 1) took PW 2 to Doboka Police Station and inf

ormed the police about the incident verbally and, on the next day, the police to ok PW 2 for medical examination, but when police did not take any action thereaf ter, she (PW 1) appeared before the Superintendent of Police, Nagaon, and as per instructions of the Superintendent of Police, she lodged an Ejahar as regards t he incident, whereupon the police produced her daughter before a Magistrate.

9. PW 1 was cross-examined by the defence at length, but nothing whatsoever could be elicited from her cross-examination to show that what she had stated w as untrue or false. Thus, the material evidence of PW 1 remained wholly unshaken . The learned trial Court has relied upon her evidence and this Court, sitting a s an appellate Court, does not find any reason to doubt the veracity or correctn ess of her evidence.

10. Though an attempt has been made by Mr. Hussain, learned Amicus Curiae, t o show that since there are two first information reports, in the present case, the case of the prosecution cannot be relied upon. While considering this aspect of the submission made on behalf of the appellant, it needs to be noted, as alr eady discussed above, that it is the General Diary Entry No.176, dated 09.01.200 2, which was really the first information report inasmuch as it was a statement, made orally, by PW 1 to the Officer-in-Charge, Doboka Police Station, disclosin g, for the first time, commission of a cognizable offence. The police reduced th e information into writing in the form of General Diary Entry No. 176, dated 09.01.2002. This information, if I may repeat, ought to have been tre ated as the First Information Report. This apart, the police took action thereo n by getting the girl medically examined. The investigation by police had, thus , commenced and whatever statement, oral or written, was, thereafter, made eithe r in the form of information by PW1 to the police, or otherwise, was nothing but statement made to the police during the investigation of the case and such stat ement falls under Section 161 Cr.P.C. The non-registration of the case was a lap se on the part of the police and, for such latches, on the part of the police, t he prosecution’s case cannot fail for, a victim has a right to a fair trail as a n accused. As regards the written information, which was subsequently given, on 6.8.2003, by PW 1, at the instruction of the Superintendent of Police, Nagaon, t o the Officer-in-Charge, Doboka Police Station, was nothing, but a statement rec orded under Section 161 Cr.P.C. in as much as the police investigation had alrea dy commenced on the basis of the oral information, which PW1 had lodged as far b ack as on 09.01.2002, with the Doboka Police Station, and the statements made th ereafter, in the form of a new First Information Report by PW1 was, in law, and in effect, nothing but statements of a witness recorded under Section 161 CrPC.

11. Though the evidence of PW 2 coupled with PW 1 is sufficient to uphold th e conviction of the accused-appellant, this Court finds that the evidence of the se two witnesses is well corroborated by the medical evidence on record inasmuch as PW 7, who is the doctor and who had examined PW 2 on 10.01.2002, as indicate d above, has deposed that he found old minor abrasion multiple in numbers in bo th sides of her face. Both sides of her labia majora and labia minora were found to have old infected laceration with discharge of pus. No spermatozoa was found in her vaginal swab. From the X-ray plate Nos.262, 263, 264, dated 10.1.03, her age was determined radiologically to be under 4/5 years . It is also important to note that in his examination, PW 7 (doctor) has further deposed that If a 4/ 5 year old girl is subjected to forceful sexual intercourse by a grown-up man, i njury, on the vaginal part, is a must and if the injury is not treated, it will be infected and sign of rape will be available. In cross-examination by defenc e, the doctor (PW 7) has categorically denied that he has not found injury on th e genital of PW 2 meaning thereby that there were, indeed, injuries sustained by PW 2 on her genitals.

12. What can also not be ignored is the evidence of PW 6, who was also the O fficer-in-charge of Doboka Police Station, at the relevant point of time, inasmu

ch as while giving his evidence, he expressed his regret for not taking the foll ow up action in the case immediately and he also admitted that it was his duty t o find out the truth.

13. As far as the remaining witnesses are concerned, they are not of much re levance and their evidence is, therefore, not required to be discussed.

14. What surfaces from the above discussion of the evidence on record is tha t the accused-appellant was well proved to have committed rape on a minor child (i.e. PW 2) and in such circumstances, the finding of guilt, reached against him , cannot be said to be bad in law. In fact, I find no infirmity, factual or lega l, in the finding of guilt reached by the learned trial Court. The conviction of the accused-appellant does not, therefore, call for any interference.

15. As far as the sentence passed against the accused-appellant is concerne d, the same also, in the facts and attending circumstances of the present case, does not call for any interference. In fact, the accused-appellant has been leni ently dealt with inasmuch as he has been, instead of being sentenced to imprison ment for life, sentenced to suffer imprisonment for a period of 10(ten) years.

16. This appeal, therefore, fails and the same shall accordingly stand dismi ssed.

17. Send back the L.C.R.

18. Let a copy of this judgment and order be sent to the Superintendent of J ail, Nagaon.